IN THE

Supreme Court of the United States

OCT 4 1972

MICHAEL RODAK, JR., CLERK

October Term, 1972
No. 71-651

STATE OF CALIFORNIA,

Petitioner,

vs.

JUDITH H. KRIVDA and RODGER T. MINOR,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I

Certiorari Has Been Providently Granted

Respondents contend that certiorari has been improvidently granted because, as they assert, the California Supreme Court's decision rests upon an independent and adequate non-federal ground.[1] (Resp. Br. pp. 52-

[1]At the outset, this argument should have been advanced as a "ground why the cause should not be reviewed" in the brief in opposition to the petition for writ of certiorari. Revised Rules of the Supreme Court of the United States, Rule 24, subd. 1. By withholding this claim until this late hour, the respondents force this Court and opposing counsel to utilize the limited time set aside for a thorough consideration of the merits in order to explore a threshold question which reasonably appeared to have been conceded at the certiorari stage. *Cf. Conway v. Calif. Adult*

(This footnote is continued on next page)

56, 63-80, 91-94. *See also* Brief of California Public Defenders Association [hereinafter CPDA Br.], pp. 1-24; Brief of National Legal Aid and Defender Association [hereinafter NLADA Br.], pp. 4-6.) Petitioner submits that this argument is untenable.

A. The Search and Seizure Article of the California Constitution Was Not an Independent Basis of the California Supreme Court's Decision

The main thrust of respondent's argument is that the decision of the California Supreme Court may have been based upon article I, section 19 of the California Constitution and *People v. Cahan,* 44 Cal. 2d 434, 282 P.2d 905 (1955), as well as federal Fourth Amendment principles. Thus asserting a possible state law basis for the decision of the Court below, the respondents invoke the principle that the jurisdiction of this Court fails where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, and the non-federal ground is independent of the federal ground and adequate to support the judgment. *Dept. of Mental Hygiene v. Kirchner,* 380 U.S. 194, 198 (1965); *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935); *see also Berea College v. Kentucky,* 211 U.S. 45, 53

Authority, 396 U.S. 107, 110 (1969). Ordinarily a contention not raised in the brief in opposition will not be considered by this Court. *Wiener v. United States,* 357 U.S. 349, 351 n. (1958). *Cf.* Rule 23(1)(c); *J. I. Case Co. v. Borak,* 377 U.S. 426, 428-29 (1964); *Namet v. United States,* 373 U.S. 179, 190 n. 11 (1963). But since the presence of an independent non-federal ground of decision may deprive this Court of jurisdiction to review the state court judgment, *Jankovich v. Toll Road Comm'n.,* 379 U.S. 487, 491 (1965), it nevertheless appears that this question may be considered despite its untimely presentation.

(1908); *Murdock v. Memphis,* 87 U.S. (20 Wall.) 590, 636 (1875).

Any assessment of the validity of this claim must begin with the opinion of the California Supreme Court. In *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 98-99 (1938), this Court observed:

> ". . . since the amendment of the judiciary act of 1789 by the act of February 5, 1867 it has always been held this Court may examine the opinion of the state court to ascertain whether a federal question was raised and decided, and whether the court rested its judgment on an adequate non-federal ground." (Footnotes omitted.) *See also Black v. Cutter Laboratories,* 351 U.S. 292, 298 (1956).

Such an examination of the opinion in *People v. Krivda,* 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971), will disclose that it contains not a single reference to article I, section 19 of the California Constitution or to *People v. Cahan, supra.* Instead the opinion is quite clearly based on federal rather than state law. The Fourth Amendment to the United States Constitution is the only constitutional provision mentioned by Mr. Justice Burke in the majority opinion. Moreover, the opinion is explicit in its reliance upon the "reasonable expectation of privacy" test formulated by this Court and having its origin in Mr. Justice Harlan's concurring opinion in *Katz v. United States,* 389 U.S. 347, 361 (1967). (*See* Pet. Op. Br., pp. 21-23, for historical development of the doctrine.) The dis-

senting opinion of Chief Justice Wright further underscores the exclusive Fourth Amendment basis of the majority opinion when he writes:

> ". . . I do not agree, however, that the area protected by the Fourth Amendment proscription of unreasonable searches and seizures encompasses parkways immediately adjacent to public thoroughfares or pedestrian walkways or that the police action enlisting the assistance of authorized trash collectors in separately picking up trash placed at the curb for pickup transmuted the collection into an unreasonable seizure." (*People v. Krivda, supra,* 5 Cal. 3d at 367-68, 96 Cal. Rptr. at 69, 486 P.2d at 1269.)

Lacking textual support for their position in the opinion of the court below, respondents argue that *People v. Edwards,* 71 Cal. 2d 1096, 80 Cal. Rptr. 633, 458 P.2d 713 (1969) and *People v. Bradley,* 1 Cal. 3d 80, 81 Cal. Rptr. 457, 460 P.2d 129 (1969) were based in part on state law. Since the *Krivda* opinion cites both of these decisions, respondents contend that *Krivda* must therefore be found to rest in part on state law grounds. Of course, this argument ignores the following language in Justice Burke's opinion for the court below:

> ". . . We conclude that the principles of Edwards and Bradley, to the extent that they depend upon like principles in Katz v. United States, supra, may properly be applied to test the validity of the search and seizure at issue herein." *People v. Krivda, supra,* 5 Cal. 3d at 365, 96 Cal. Rptr. at 67, 486 P.2d at 1267.

The clear import of Justice Burke's words is that *Edwards* and *Bradley* were applicable to the instant case only insofar as those decisions were compelled by this Court's decision in *Katz*. Thus, it is readily apparent that the court below based its judgment exclusively on federal grounds. Accordingly this Court has jurisdiction to review this case where, as here, the state court might have based its decision on a non-federal ground but did not in fact do so. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938); *Int'l. Steel Co. v. Nat'l. Surety Co.*, 297 U.S. 657, 666 (1936); *Grayson v. Harris*, 267 U.S. 352, 358 (1925). *See also Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 375-76 (1968).

Respondents then argue that the California Supreme Court may impose more stringent standards for searches and seizures than are required by this Court in interpreting the Fourth Amendment. (Resp. Br. pp. 72-75.) In *Cooper v. California*, 386 U.S. 58, 62 (1967), this Court stated:

> "Our holding, of course, does not affect the State's power to impose higher standards of searches and seizures than required by the Federal Constitution if it chooses to do so. . . ."

In the present case, however, this proposition is no talisman capable of warding off review. As has been shown above, the California Supreme Court based its decision in this case on its view of what was required by federal law. Nothing in the opinion manifests an intention to go beyond the mandate of the Fourth Amendment.

B. No Special California Definition of "Abandonment" Serves as an Adequate State Law Basis for the Decision Under Review

Respondents contend that the *Krivda* decision rests upon a special California definition of "abandonment" which this Court is bound to accept. (Resp. Br. pp. 52-53.) Hence they claim that the decision rests on a question of local law not reviewable by this Court.

This contention lacks merit. The opinion states that "The placement of one's trash barrels onto the sidewalk for collection is not . . . necessarily an abandonment of one's trash to the police or general public." *People v. Krivda, supra,* 5 Cal. 3d at 366, 96 Cal. Rptr. at 68, 486 P.2d at 1268. This observation was made in the context of determining whether the discovery of marijuana in the trash was the product of an unlawful search or seizure. Therefore, California's resolution of the abandonment issue is not binding on this Court.

Upon appeal from a state court, this Court has jurisdiction to review or independently determine all questions on which a federal right is necessarily dependent. *United States v. Pink,* 315 U.S. 203, 217-18 (1942). In *Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110, 121 (1954), it was held that this Court has the duty to decide for itself the facts or constructions upon which federal constitutional issues rest. This Court specifically applied this rule to the search and seizure field. In *Ker v. California,* 374 U.S. 23, 34 (1963), Mr. Justice Clark wrote for the Court:

> ". . . While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination

> of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—i.e., constitutional—criteria established by this Court have been respected. . . ."

The determination of whether respondents' trash was abandoned at the time of its collection is preliminary to and so closely connected with the ultimate resolution of the search and seizure issue here that it is unquestionably part of the first federal question presented for review, and not an independent state law ground for the California Supreme Court's decision.

C. The Judgment of the Court Below Is Not Independently Grounded Upon a State Interpretation of Local Ordinances

In its opinion, the California Supreme Court adverted to the fact that many municipalities have local ordinances which regulate the collection of garbage. *People v. Krivda, supra,* 5 Cal. 3d at 366, 96 Cal. Rptr. at 68, 486 P.2d at 1268. Respondent suggests that the interpretation placed upon these ordinances by the California Supreme Court is another purportedly adequate state law ground frustrating this Court's jurisdiction. (Resp. Br. pp. 64-67, 80.) The opinion quite clearly does not rely upon the interpretation of the garbage ordinances as a ground of decision. In the context of the opinion, these ordinances are merely cited as support for the lower court's thesis that respondents had a reasonable expectation of privacy in the trash which was ultimately searched. Under the authorities cited in the preceding section of this argument, this Court is entitled to draw its own conclusions as to the significance of such municipal ordinances.

II

Respondents' Trash Was Lawfully Examined in the Well of the Trash Truck

A. The Municipal Garbage Collection Ordinances Do Not Demonstrate That Respondents Had a Reasonable Expectation of Privacy in the Trash Searched in This Case

The existence of local ordinances regulating the disposal of trash and limiting the person authorized to collect it should not be construed as indicative of a general societal recognition of a privacy interest in one's discarded trash. When this case was before the California Supreme Court, Justice Burke referred to such ordinances, stating:

> "The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public. To the contrary, many municipalities have enacted ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated. (See, e.g., Los Angeles County Ord. No. 5860. ch. IX, §§ 1611-1622, 1681-1691.) Moreover, these ordinances commonly prohibit unauthorized persons from tampering with trash containers. (Id., § 1710.) The provisions of these ordinances would appear to refute the view that the contents of one's trash barrels become public property when placed on the sidewalk for collection." *People v. Krivda, supra,* 5 Cal. 3d at 366, 96 Cal. Rptr. at 68, 486 P.2d at 1268. (Footnote omitted.)

First of all, it should be noted that the Los Angeles County ordinances mentioned in the California Su-

preme Court's opinion did not apply to the disposal of respondents' trash because the respondents' home was located in the City of Los Angeles and not in an unincorporated area of the county.[2] Thus, ordinances of the City of Los Angeles govern the removal of respondents' garbage.[3] Two city ordinances prohibited the tampering with garbage containers by persons other than the owner or his agents, the trash collector, or city officers or employees. Los Angeles Municipal Code §§ 66.03, 66.28. By the express terms of these ordinances, city officers such as policemen were exempt from the operation of these two ordinances.

Secondly, it is by no means clear that these ordinances were enacted to protect the privacy expectations of householders. A more logical inference is that this type of ordinance was enacted as a public health measure to control litter. The early California case of

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[2]It has long been established that this Court may take judicial notice of the boundaries and territorial limits of municipalities. *See Griffing v. Gibb*, 67 U.S. (2 Black) 519, 523 (1862). *Cf. Deutch v. United States*, 367 U.S. 456, 470 (1961). The street address of respondents' house was 1901 Nolden. (App. p. 27.) The street maps of the Los Angeles metropolitan area show that address to be located within the City of Los Angeles.

[3]*In Ex parte Roach*, 104 Cal. 272, 277, 37 Pac. 1044, 1046 (1894), the California Supreme Court held that the organization of a city within the boundaries of a county resulted in the withdrawal of the territory thus organized from the legislative control of the county. Article XI, section 7 of the California Constitution provides that "A county or city may make and enforce within its limits all local, police, *sanitary*, and other ordinances and regulations not in conflict with the general laws." (Emphasis added.) This section has been held to vest broad authority in the cities to enact municipal ordinances giving them the exclusive right to collect garbage within their respective boundaries. *Matula v. Superior Court*, 146 Cal. App. 2d 93, 98-99, 303 P.2d 871, 874 (1956).

In re Zhizhuzza, 147 Cal. 328, 81 Pac. 955 (1905), indicates that public health objectives were probably paramount in the enactment of such ordinances. In that case, the California Supreme Court stated:

> "The removal and disposition of garbage, as well as the regulation of slaughter-houses in cities and towns, is peculiarly a subject of municipal control, as without proper regulation either might become an intolerable nuisance and dangerous to the health and lives of citizens." *Id.* at 335, 81 Pac. at 958.

While on the California Court of Appeal, the author of the California Supreme Court opinion in this case relied upon *Zhizhuzza* in upholding municipal garbage disposal regulations as a valid exercise of the police power safeguarding public health. *Silver v. City of Los Angeles,* 217 Cal. App. 2d 134, 138-141, 31 Cal. Rptr. 545, 548-49 (1963) (per Burke, P.J.).

This Court has also recognized that public health considerations were instrumental in leading to the adoption of local ordinances regulating disposal and destruction of garbage and other refuse. *California Reduction Co. v. Sanitary Reduction Works,* 199 U.S. 306, 316-17, 319-24 (1905). *See also* Annot., *Regulation and Licensing of Private Garbage or Rubbish Removal Services,* 83 A.L.R. 2d 799, 801-02 (1962). Thus, municipal ordinances restricting the right to collect trash are equally as susceptible to a public health interpretation as to the privacy interpretation given

them by the California Supreme Court. Absent any authoritative legislative history on the subject, the public health interpretation appears to be the more persuasive. *Cf.* dissenting opinion of Chief Justice Wright, *People v. Krivda, supra,* 5 Cal. 3d at 368 n. 1, 96 Cal. Rptr. at 69, 486 P.2d at 1269.

B. The Garbage Collectors Were Not Police Agents

It is also contended that the trash collectors acted as police agents in this case. (CPDA Br. pp. 39-44.) But since petitioner argues that the trash examined by the police had been abandoned prior to its collection (Pet. Op. Br. pp. 11-20), it is not necessary to reach this issue. Whether the garbage collectors were police agents is relevant only to fixing the point in time prior to which the abandonment had to have occurred. If the garbage collectors were police agents, the trash had to have become abandoned property prior to its collection. If they were not, the abandonment had to occur prior to the police examination of the trash in the well of the trash truck. Since, as petitioner contends, the trash was abandoned as soon as respondent Minor placed it on the curb for collection, the status of the trash collectors need not be determined since their activities took place subsequent to the abandonment of respondents' trash.

Conclusion

For the reasons expressed in both of petitioner's briefs, petitioner urges that the judgment of the California Supreme Court be reversed.

Respectfully submitted,

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